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IN THE

Supreme Court of the United States

OCTOBER TERM—1951

HENRY C. WILSON and EDITH Y. EDWARDS, as Executors under the last Will and Testament of LEWIS G. YOUNG, deceased,

Petitioners-Plaintiffs below,

v.

FRANK W. KRAEMER, as Collector of Internal Revenue for the District of Connecticut, and ano.,

Respondents-Defendants below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

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Respondents-Defendants below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the HON. CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners, executors under the last Will and Testament of LEWIS G. YOUNG, deceased, pray this court for the issuance of a writ of certiorari to the United States Court of Appeals, for the Second Circuit, to review the decision of said court, dated the 4th day of June, 1951, which affirmed a judgment of the United States District Court for the District of Connecticut (Judge J. Joseph Smith), dismissing the complaint of plaintiffs in this action to recover estate taxes claimed to have been illegally assessed.

Decision Below

The opinion of the Court of Appeals (R. 107) has not yet been reported.

Statement of the Matter Involved

The jurisdiction of this court is invoked under section 240(a) of the Judicial Code, as amended, and Rule 38 of this court.

The question involved is the meaning and application of section 403(d)(3) of the Revenue Act of 1942. Section 403 of that Act amended section 811(f) of the Internal Revenue Code, with respect to the taxability of property subject to powers of appointment in the estates of donees of such powers. Sub-section (d)(3) of section 403 excepted property subject to powers created before passage of that legislation, provided the power was "not exercised". The question in this case is whether petitioners' testator, the donee of such a power, had exercised the same within the meaning of the exception.

The facts, which are elaborated more fully in the brief submitted herewith, are briefly as follows:

Petitioners' testator Lewis G. Young was the donee of powers of appointment under an *inter vivos* trust and testamentary trust created for his benefit by his mother, MINNIE E. YOUNG. The instruments creating the powers provided that, in default of valid exercise of the powers, in whole or in part, the property covered thereby should pass to the descendants of the donee, Lewis G. Young. At his death, he had but one descendant, a daughter, the petitioner, EDITH Y. EDWARDS, who concededly would have taken any portion of the property not validly appointed.

The value of the corpora of the trusts at decedent's death was $583,648.61.

By his will made in 1939, some three years before the enactment of the Revenue Act of 1942, decedent exercised his powers of appointment to the extent of giving $20,501 of the appointive property to five persons. The balance he purported to give by absolute and outright gift to his said daughter, Edith Y. Edwards. The question here is whether that purported gift, which was in quality and character identical with the gift over by the grandmother in default of the valid exercise of the powers, was such an "exercise" thereof as to nullify the exception of section 403(d)(3).

The daughter in writing, formally renounced taking under her father's will and received the property directly from the trustees under her grandmother's direction over.

For the reasons set forth in the brief submitted herewith, petitioners urge that here there was no such exercise; that the statute contemplated a legally effective act which modified the direction of the donor of the powers with respect to the inheritance of the property in default of valid exercise of the powers; that under applicable and controlling New York law the verbal statement of decedent, a mere echo of his mother's direction, was without validity or legal effect, in consequence whereof the value of the property was not includible in decedent's estate.

The petitioners respectfully contend that the decisions below are in conflict with the decision of this court in *Rogers* v. *Helvering,* 320 U. S. 410, where this court said (at p. 415):

> "Where a donee of a power merely echoes the limitations over, upon default of appointment, he may well be deemed not to have exercised his power * * *."

Petitioners respectfully contend that the words "not exercised" as used by Congress in section 403(d)(3) of the Revenue Act of 1942 contemplated such a situation

as was referred to by this court in the foregoing quotation, which was precisely the situation existing at bar.

In addition to the conflict between the decisions below and the ruling of this court, the correct determination of the questions here involved is important to the proper administration of the estate tax laws, as well as to decedent's estate which has suffered a tax of $179,283.73 and heavy interest by reason of the action herein complained of.

The Questions Presented

Accordingly, petitioners respectfully submit that the following questions should be reviewed by this court:

(1) Under section 403(d)(3) of the Revenue Act of 1942, is a power of appointment exercised when a decedent echoes the gift over by the donor of the power in default of valid exercise of the power?

(2) Was the provision of the will of decedent, Lewis G. Young purporting to give his daughter, Edith Y. Edwards, property subject to his powers of appointment conferred upon him by his mother, Minnie E. Young, an exercise of such powers within the meaning of section 403(d)(3) of the Revenue Act of 1942?

(3) Was the complaint herein properly dismissed?

Review of the foregoing questions on writ of certiorari is respectfully requested.

Dated, New York, August 8th, 1951.

Respectfully submitted,

LAWRENCE S. GREENBAUM,
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IN THE

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HENRY C. WILSON and EDITH Y. EDWARDS, as Executors under the Last Will and Testament of LEWIS G. YOUNG, deceased,

Petitioners-Plaintiff below,

against

FRANK W. KRAMER, as Collector of Internal Revenue for District of Connecticut, et al.,

Respondents-Defendants below.

BRIEF FOR PETITIONERS

The Question Involved

The case turns upon the correct interpretation of paragraph 3 of subsection (d) of section 403 of the Revenue Act of 1942, which section radically amended section 811 (f) of the Internal Revenue Code, regulating the taxation of powers of appointment in the estate of the donee. Paragraph 3 of the subsection exempted preexisting powers if "not exercised." The question here is whether decedent, the donee "exercised" his powers within the meaning of that paragraph.

The Facts

On July 26, 1930 (R. 93), Minnie E. Young, the mother of Lewis G. Young, the decedent herein, made, executed and delivered in the City, County and State of New York, of which she was a resident, an indenture of trust, wherein she created a trust for the benefit of said Lewis G. Young for his life, with power of appointment in said Lewis G. Young to dispose of the principal of the trust upon his death, in the following language (R. 94):

> "* * * to such persons and upon such estates, in trust or otherwise, as he may by his last will and testament validly appoint, or, in case he shall fail to make such valid disposition or appointment of the trust estate so held for him, *in whole or in part,* then to pay over said trust estate, *or any part thereof* which may not have been validly disposed of by appointment to the descendant or descendants of the Grantor's said son him surviving in equal shares, per stirpes and not per capita, absolutely and forever." (Emphasis added.)

On October 20th, 1931 (R. 94), the said Minnie E. Young died, a resident of the City, County and State of New York. By her last will and testament, duly admitted to probate in the Surrogate's Court of New York County on January 9th, 1932, she set up, by paragraph 8 (b) of said will, a testamentary trust for the benefit of said Lewis G. Young during his life, upon the same terms as to disposition upon his death as was provided by said inter vivos trust (R. 75).

Lewis G. Young, the decedent, was born August 12th, 1882 (R. 93); on May 25th, 1918 he married Ruth Read (R. 93); said marriage was in force and effect at the date of decedent's death, although the parties were living separate and apart pursuant to a judgment of separation obtained by the wife on February 27th, 1936 in the Supreme

Court, Westchester County, State of New York (R. 38). One child was born of the marriage, petitioner, Edith Y. Edwards (R. 93), who is the only descendant of decedent (R. 99).

Decedent died, a resident of Sherman, Connecticut, on January 12th, 1944 (R. 93).

His last will and testament, dated March 2nd, 1939 (R. 86, 89), was duly admitted to probate by the Court of Probate of the District of Sherman, State of Connecticut, on January 25th, 1944, and petitioners are the duly qualified executors thereunder. In his said last will and testament, after reciting the grant of the powers by deed and will, he purported to exercise such powers as follows (R. 85):

> "FOURTH: Pursuant to the power of appointment and disposition given me by my mother, and expressed in the third clause hereof, I give and bequeath to
>
> A. Roy M. Allen of Bloomfield New Jersey the sum of eight thousand dollars ($8,000.00)
>
> B. Robert Dennis of Milford Connecticut, the sum of six thousand five hundred dollars ($6,500.00)
>
> C. Henry C. Wilson of the Law Firm of Wilson & Hanna, Danbury, Connecticut, the sum of six thousand dollars ($6,000.00) in lieu of executor's fees
>
> D. Kathleen Brush of Mount Vernon, New York, one thousand dollars $1,000.00)
>
> E. Edna Y. Oldrin of Darien, Connecticut the sum of one dollar ($1.00)
>
> F. My daughter Edith Joan Young all the rest, residue and remainder of the trust funds created by my mother under the deed of trust dated January 30, 1931 but made as of July 26th, 1930, and under her last Will and Testament dated July 26th, 1930, and

now held by The County Trust Company of White Plains, New York as surviving successor trustee, and two thirds of my separate estate both real and personal."

At the date of decedent's death, the value of the corpus of the inter vivos trust was the sum of $561,859.91 and the value of the corpus of the testamentary trust was $21,788.70 (R. 51, 57), a total of $583,648.61 (R. 98).

The Commissioner of Internal Revenue included in decedent's estate for estate tax purposes the whole of the said corpora of the trusts (R. 98).

Petitioners contend that the only portion of said corpora which should have been so included is the sum of $20,501.00, the total of the sums appointed by decedent to others than his daughter, and that the balance, passing to his daughter, should not have been included therein (R. 13, 16, 97).

The amount of the tax assessed and paid by virtue of the inclusion of the value of the property passing to the daughter, with interest paid thereon, is the sum of $202,575.06, to recover which this action was brought, with interest on $183,488.75 paid to defendant Kraemer from May 17th, 1947, and on $19,086.11 paid to defendant Fitzpatrick from October 15th, 1949 (R. 4, 23).

The Statutes Involved

Section 811 (f) of the Internal Revenue Code as it existed prior to October 21, 1942, so far as is material, provided that property was includible in the estate of decedent:

"To the extent of any property passing under a general power of appointment exercised by the decedent (1) by will, * * *"

Section 811 (f) as amended by section 403 of the Revenue Act of 1942, and as it presently exists, so far as material, provided that property should be so includible:

> "To the extent of any property (A) with respect to which the decedent has at the time of his death a power of appointment, or (B) with respect to which he has at any time exercised or released a power of appointment in contemplation of death, or (C) with respect to which he has at any time exercised or released a power of appointment by a disposition intended to take effect in possession or enjoyment at or after his death * * *"

Under the foregoing provision (A), the property here involved was taxable unless saved by paragraph (3) of subsection (d) of section 403 of the Revenue Act of 1942, reading as follows:

> "(3) The amendments made by this section shall not apply with respect to any power to appoint created on or before the date of the enactment of this Act if it is released before January 1, 1943, or within the time limited by paragraph (2) in cases to which such paragraph is applicable; or if the decedent dies before January 1, 1943, or within the time limited by paragraph (2) in cases to which such paragraph is applicable, and such power is not exercised."

By successive acts, the date provided in the above paragraph was extended to July 1, 1951.

Summary of Argument

Since decedent died on January 12, 1944, the question is, as we have said, whether he "exercised" his power with respect to the property passing to his daughter.

If, as we contend, to be "exercised" within the meaning of the statute, the appointment must be a legally effective act under relevant state law, specifically, one that creates a different interest than provided by the gift over in the trust instruments in default of a legal appointment, then decedent herein had "not exercised" his power, because he merely echoed the precise gift over provided in the trust instruments, and in consequence, the property passing to the daughter under her grandmother's gifts was not taxable in the estate of decedent.

POINT I

With respect to the property passing to his daughter, decedent did not exercise his powers of appointment within the meaning of section 403 (d) (3) of the Revenue Act of 1942.

A comparison with former section 811 (f) shows that section 403 of the Revenue Act of 1942 made a radical change in the taxability of powers of appointment. Thereby, on and after October 21, 1942, the mere existence of a power at death became sufficient to render the property subject thereto taxable in the estate of the donee.

Theretofore, unless the property had passed under the exercise of such power the property was not taxable.

Helvering v. *Grinnell* (1935), 294 U. S. 153.

The Legislative History

Congress was aware of the momentous and unforeseeable consequences of this change upon existing powers and the ambulatory exercise thereof in existing wills.

The contemporary reports of both Houses reflect that awareness. While when first considered it was contemplated to tax general powers then in existence, the decision ultimately made was to exempt such powers if affirmatively released, or, negatively not exercised, by January 1st, 1943.

The conference report, in accordance with which section 403 was ultimately drawn, clearly summarized this development (House Report No. 2586, 77th Congress, 2nd Session, p. 69):

> "Amendment No. 399: This amendment revises the provisions governing the applicability of section 403 to existing powers of appointment. Under the House bill non-general powers, created on or before the date of enactment of this act, are not taxable if released within two years after the date of enactment of the act or if exercised on or before such date. The House bill also provided that the amendments are not applicable with respect to a power to appoint released on or before the date of enactment of this act. The Senate amendment provides that non-general powers, created on or before the date of enactment of this act, are not taxable unless exercised after such date. This change makes allowance for the inability to release various non-general powers under applicable local law. The Senate amendment also provides that the amendments made in the House bill shall not apply to any power created on or before the date of enactment of this act if released on or before January 1, 1943. In addition, the Senate amendment contains a special rule for those under a legal disability at the date of enactment of this act. The House recedes with certain technical amendments."

Among the technical amendments was the provision here directly involved. Whereas, when the bill went to confer-

ence, the saving clause was limited to affirmative release, the conference provision amplified paragraph (3) of subsection (d) so that it exempted the property if the donee died before January 1, 1943 and the power was "not exercised".

Thereby, in addition to affirmative release negative nonexercise also served to exempt the property.

While originally, less than three months' grace, to January 1, 1943, was allowed thus to exempt general powers, subsequent considerations convinced Congress that more time should be allowed.

On December 17th, 1942, pursuant to recommendation of general counsel of the Treasury (House Report 2708, 77th Congress, 2d Session), the time was extended to July 1st, 1943.

In connection with 1943 revenue legislation, embodied in the Current Tax Payment Act of 1943, the House, in its bill, included no provision to extend the time further, but the Senate amended the bill by including a provision therefor which was approved in conference.

The conference report (House Report 510, 78th Congress, 1st Session) stated (p. 70):

> "Section 10 of the Senate bill extends the time in connection with the release of powers of appointment for estate and gift tax purposes from July 1, 1943 to March 1, 1944. There was no comparable provision in the House bill. The conference amendment retains this provision".

The section provided:

> "SECTION 10. EXTENSION OF TIME IN CONNECTION WITH RELEASE OF POWERS OF APPOINTMENT. Section 403 (d) (3) of the Revenue Act of 1942 is amended

by striking out 'July 1, 1943' wherever it appears and inserting in lieu thereof 'March 1, 1944' * * *"

This was the situation when on January 12th, 1944, decedent died (R. 93).

Though plaintiffs' rights are to be determined by the status of the legislation at his death, subsequent legislation in its bearing on congressional purpose is surely relevant. In this light, the concern shown by Congress in successively extending the time of release to July 1, 1951, is significant.

The intent of Congress not to tax general powers if donees were unaware of the new provisions is most decisively evidenced by congressional action in 1948, six years after the original amendment in 1942. By the joint resolution which extended the time limit to July 1, 1949, it was provided in section 2 thereof (Public Law 675, 80th Congress) as follows:

"For the purposes of sections 403 and 452 of the Revenue Act of 1942, a power to appoint created by a will executed on or before October 21, 1942, shall be considered a power created on or before such date if the person executing such will dies before July 1, 1949, without having republished such will, by codicil or otherwise, after October 21, 1942."

The House Report (No. 1907, 80th Congress, 2nd Session) is enlightening:

"The Revenue Act of 1942 made a number of significant changes in the treatment under the estate and gift taxes, of property which is subject to a power of appointment created by a person other than the holder of the power. However, in order to enable holders of previously created powers to adjust their affairs

in the light of the new legislation, it was simultaneously provided that such persons could release their powers within a stated period of time without incurring any tax liability. This grace period has been extended on several occasions since the enactment of the 1942 act because of the difficulties persons have encountered in making the desired adjustments and the need for additional time to study possible changes in the 1942 legislation, particularly in connection with pre-existing powers. Prior laws have extended the time for release of such powers to July 1st, 1948. It is believed by your committee that the extension granted under the resolution will be ample to permit this whole matter to be considered in the early part of next year.

"Section 2 provides that a power to appoint created by a will executed on or before October 21, 1942 shall be considered a power created on or before that date if the person executing the will dies before July 1, 1949 without having republished the will by codicil or otherwise after October 21, 1942."

Certainly, if in 1948, Congress thus protected testators who through unawareness of the 1942 amendment had failed to amend their wills so as to eliminate powers therein set up, the 1942 legislation ought not to be so harshly construed against the decedent at bar who had made his will in 1939 (R. 87) prior to that legislation, and had died within 15 months of its enactment, on January 12th, 1944 (R. 93).

That strictly, as well as within the congressional intent, the will of decedent did not subject the property passing to the daughter to taxation, may readily be shown.

"Exercise" as used by Congress was a word of art, with the settled, judicial meaning of a legally effective act

With respect to powers of appointment, "exercise" was not a word first used in the Revenue Act of 1942. As our quotation shows (p. 8), it had been previously used in section 811 (f) of the Internal Revenue Code, which was a reenactment of section 302 (f) of the Revenue Act of 1926.

Having been used before, it is to be presumed that when Congress used it again in 1942, it did so, as a word of art, in the sense that the word had been defined and limited in authoritative judicial decisions.

> *U. S.* v. *Merriam,* 263 U. S. 179, 187;
> *Old Colony R. Co.* v. *Com.,* 284 U. S. 552, 560;
> *Case* v. *Los Angeles L. P. Co.,* 308 U. S. 106, 115.

In the *Merriam* case, *supra,* the question was to the meaning of "bequest" in the federal income tax statute.

This court said (p. 187):

> "The word 'bequest' having the judicially settled meaning which we have stated, we must presume it was used in that sense by Congress. Kepner v. United States, 195 U. S. 100, 124, 49 L. ed. 114, 122, 24 Sup. Ct. Rep. 797, 1 Ann. Cas. 655; The Abbotsford (The Abbotsford v. Johnson) 98 U. S. 440, 444, 25 L. ed. 168, 169.
>
> On behalf of the government it is urged that taxation is a practical matter, and concerns itself with the substance of the thing upon which the tax is imposed, rather than with legal forms or expressions. But in statutes levying taxes the literal meaning of the words employed is most important, for such statutes are not to be extended by implication beyond the clear import

of the language used. If the words are doubtful, the doubt must be resolved against the government and in favor of the taxpayer. Gould v. Gould, 245 U. S. 151, 153, 62 L. ed. 211, 213, 38 Sup. Ct. Rep. 53."

In the *Case* case, *supra,* one of the questions was as to the meaning of "fair and equitable" under section 77B of the Bankruptcy Act. This court said (p. 115):

> "The words 'fair and equitable' as used in sec. 77B (f) are words of art which prior to the advent of sec. 77B had acquired a fixed meaning through judicial interpretations in the field of equity receivership reorganizations. Hence, as in case of other terms or phrases used in that section, Duparquet Huot & M. Co. v. Evans, 297 U. S. 216, 80 L. ed. 591, 56 S. Ct. 412, 30 Am. Bankr. Rep. (NS) 329, we adhere to the familiar rule that where words are employed in an act which had at the time a well known meaning in the law, they are used in that sense unless the context requires the contrary. Keck v. United States, 172 U. S. 434, 446, 43 L. ed. 505, 510, 19 S. Ct. 254."

That prior to the enactment of the Revenue Act of 1942, the word "exercise" had a "judicially settled meaning", a "well known meaning in the law", is clear.

Restatement, Law of Property, sec. 327, comment b, page 1854; sec. 369;
Helvering v. *Grinnell,* 294 U. S. 153, 156;
Rogers v. *Helvering,* 320 U. S. 410, 415;
Matter of Lansing, 182 N. Y. 238, 243;
Matter of Ripley, 192 N. Y. 536;
Matter of Slosson, 216 N. Y. 79, 81;
Matter of Duryea, 277 N. Y. 310, 316;
Estate of Mabel Wooster, 9 T. C. 742, 747.

In *Matter of Lansing, supra,* the question of the taxability, under a New York statute, of a power of appointment which merely repeated the direction of the donor was considered. In holding it not to be taxable, the court said (p. 243):

> "Her (the appointee's) rights were fixed by the will of her grandfather, and unless changed pursuant to its provisions her estate in expectancy would become an estate in possession upon the death of her mother * * *. Although the power was exercised in form, her title was perfect without it and she derived no benefit from it. The power was to dispose of the remainder and the remainder was not disposed of but continued where it was. The attempt to exercise the power was not effective, because it did nothing. The exercise of a power which leaves everything as it was before is a mere form, with no substance."

In *Helvering* v. *Grinnell, supra,* decided in 1935, the same question was presented under section 302 (f), later section 811 (f), of the Internal Revenue Code, prior to its amendment by section 403 of the Revenue Act of 1942.

In reaching the same conclusion as *Matter of Lansing,* this court quoted, with approval, the excerpt from the *Lansing* case noted above.

While *Rogers* v. *Helvering, supra,* was decided on December 6, 1943 (R. 89), after the 1942 Act was passed, and involved section 811 (f) as it stood prior to the 1942 amendment, it reflected the prior settled meaning of "exercise", this court saying (p. 415):

> "Where a donee of a power merely echoes the limitations over upon default of appointment, he may well be deemed not to have exercised his power and therefore not to have passed any property under such a power."

The foregoing citations make it clear that, prior to the enactment of section 403 of the Revenue Act of 1942, by well known, judicially settled meaning, concurred in by this court, the word "exercise" in relation to a power of appointment meant an effective, legal disposition of the property different from that stipulated by the donor in default of the exercise of the power, and, specifically, that a mere repetition or echo of such disposition over in default would not be a legal, effective use of the power.

Accordingly, it is in this sense that Congress must be deemed to have used the word.

Whether the power was legally exercised is to be determined by the applicable local law, here the law of New York

That the legality and effectiveness of decedent's act as an exercise of his powers is to be determined by the relevant state law under which the *inter vivos* trust was created, administered and provided to be contrued (R. 67) and the will probated (R. 94) is well settled.

Blair v. *Commissioner,* 300 U. S. 5, 9-10;
Helvering v. *Stuart,* 317 U. S. 154, 162;
Rogers v. *Helvering,* 320 U. S. 410, 414.

In *Helvering* v. *Stuart, supra,* this court said (p. 161):

> "When Congress fixes a tax on the possibility of the revesting of property or the distribution of income, the necessary implication, we think, is that the possibility is to be determined by the state law. Grantees under deeds, wills and trusts alike, take according to the rule of the state law. The power to transfer or distribute assets of a trust is essentially a matter of local law, Blair v. Commissioner, 300 U. S. 5, 9; Frenler v. Helvering, 291 U. S. 35, 43-45 * * *. Recently in dealing with the estate tax levied upon the

value of property passing under a general power, we said that state law creates legal interests and rights. The federal revenue acts designate what interests or right, so created, shall be taxed, Morgan v. Commissioner, 309 U. S. 78, 80 * * *."

In *Rogers* v. *Helvering, supra,* this court said (p. 414):

"Whether by a testamentary exercise of a general power of appointment property passed under § 302 (f) is a question of federal law, once state law has made clear, as it has here, that the appointment has legal validity and brought into being new interests in property. See Helvering v. Stuart, 317 U. S. 154."

Clearly, the attempted appointment here "brought into being (no) new interests in the property," and under New York law heretofore cited was unquestionably without "legal validity."

That decedent's purported disposition in favor of his daughter was a mere echo is beyond question

Decedent, by his will made March 2, 1939 (R. 86) prior to the Revenue Act of 1942 provided:

"Pursuant to the power of appointment and disposition given me by my mother * * *. I gave and bequeath to

(here follow the 5 bequests to strangers totalling $20,501, admittedly taxable)

"F My daughter Edith Jones Young all the rest, residue and remainder of the trust funds created by my mother under the deed of trust dated January, 1931, but made as of July 26, 1930, and under her last Will and Testament dated July 26, 1930 * * *."

This was identical with the gift over previously made by decedent's mother, both in trust instrument (R. 61, 93) and in her will (R. 76, 95).

The trust provided that (R. 61):

> "* * * in case he shall fail to make such valid disposition or appointment of the trust estates so held for him, in whole or in part, then to pay over said trust estate, or any part thereof which may not have been validly disposed of by appointment, to the descendant or descendants of the Grantor's said son him surviving * * * absolutely and forever * * *."

The will was similar (R. 76):

> "* * * in case he shall not survive me, or shall fail to make valid disposition or appointment of the share so held in trust for him, in whole or in part, to pay over the principal of the said trust fund to the surviving descendant or descendants of my said son * * * absolutely and forever;."

It is clearly apparent that Mr. Young created no new interest nor different estate in remainder from that created by his mother. She gave, absolutely, any portion not validly appointed to her son's descendant, him surviving. He did precisely the same.

Therefore, under the authorities heretofore cited (p. 16) he did not exercise his power because that power was to dispose of the property in a manner different from his mother's directions over.

This is made obvious by the fact that, having renounced any rights under her father's will, the daughter has received the property from the trustee under the provisions of the original instruments (R. 99-102).

Since, then, Mr. Young's act was not a legal exercise of his powers under either state or federal law, the assessments herein complained of was unauthorized and plaintiffs are entitled to appropriate refund.

The Rulings Below

Judge Smith, the trial judge, apparently agreed that, under the judicial authorities, there had not been a legal exercise of the power, saying (R. 90):

> "Under the *Grinnell* case and the dictum in the *Rogers* case, it would be necessary to hold that the purported exercise of the power over the property which passed to Edith Young Edwards was ineffective and this property was not includible in the estate of the donee of the power, Lewis G. Young, unless it was made includible by the 1942 amendments to the Act."

He further said, after summarizing plaintiffs' contentions (R. 91):

> "On the face of it, this is a plausible and consistent argument and is a possible interpretation of the terms of the exception in view of the wording of the *Rogers* opinion."

Judge Frank below thus construed *Helvering* v. *Grinnel, supra,* and *Helvering* v. *Safe Deposit Co.* (316 U. S. 56, 65) (R. 108):

> "We take it that those decisions established this rule: If the exercise of the power merely echoed the limitations over upon default (and especially if the appointee renounced the appointment), there was no 'passing' under the powers within § 302(f)."

It would seem to be obvious that the only reason there could be no such passing was that the power had not been exercised. If it had been, then the property would necessarily have "passed." Therefore, Judge Frank's construction impliedly concedes our contention that an echo is a non-exercise, accomplishing nothing. Otherwise, the property could not escape "passing."

Estate of *Sarah Moran* v. *Commissioner,* 16 Tax Court No. 100, cited below (R. 110), is not in point here for the reason, as the Tax Court pointed out (p. 5), that the donee in exercising power did not echo the gift over but appointed the property differently.

Likewise, *Guaranty Trust Co.* v. *Johnson,* 165 Fed. 2d 298, also cited below (R. 111) is inapplicable for the reason that also there was no echo, the donee appointing the property to her residuary estate.

Both courts below heavily relied upon section 81.24 of Treasury Regulations 105, as follows:

> "A power to appoint is exercised where the property subject thereto is appointed to the taker in default of an appointment regardless of whether or not the appointed interest and the interest in default of appointments are identical, and regardless of whether or not the appointee renounces any right to take under the appointment."

We submit that this regulation is invalid because it is inconsistent with the statute which it purports to regulate, is in conflict therewith, and unreasonable.

U. S. v. *United Verde Copper Co.,* 196 U. S. 207, 215;
Manhattan G. E. Co. v. *Commissioner,* 297 U. S. 129, 134.

In the *United Verde Copper* case, where a regulation attempted to limit and define the meaning of "other domestic purposes" as used in a statute, the court said (p. 215):

> "But there is a more absolutely fatal objection to the regulation. The Secretary of the Interior attempts by it to give an authoritative and final construction of the statute. This, we think, is beyond his power. * * * If rule 7 is valid, the Secretary of the Interior has power to abridge or enlarge the statute at will. If he can define one term, he can another. If he can abridge, he can enlarge. Such power is not regulation; it is legislation. The power of legislation was certainly not intended to be conferred upon the Secretary."

In the *Manhattan* case, where the validity of a Treasury income tax regulation was involved, the court said (p. 134):

> "The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law—for no such power can be delegated by Congress—but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity. Lynch v. Tilden Produce Co., 265 U. S. 315, 320-322, 68 L. ed. 1034-1036, 44 S. Ct. 488; Miller v. United States, 294 U. S. 435, 439, 440, 79 L. ed. 977, 980, 981, 55 S. Ct. 440, and cases cited. And not only must a regulation, in order to be valid, be consistent with the statute, but it must be reasonable. International R. Co. v. Davidson, 257 U. S. 506, 514, 66 L. ed. 341, 346, 42 L. ed.

179. The original regulation as applied to a situation like that under review is both inconsistent with the statute and unreasonable."

The assumption that congressional intention as to the meaning of "exercise" was embodied in the Treasury regulation because of the repeated extensions of the expiration date of the exception loses sight of the fact that "exercise" appears also in the original and amended section 811 (f), not directly affected by the extensions, and of the rule of construction that mere negative action by Congress is not to be taken as approval of a particular interpretation, judicial or administrative.

Girouard v. *U. S.*, 328 U. S. 61;
Houghton v. *Payne*, 194 U. S. 88.

And it is to be particularly noted that here that was no re-enactment but only changes of dates.

At the time of decedent's death, the time had been twice extended. When first extended in December, 1942, to July 1, 1943, the Treasury regulations had not yet been promulgated.

At the time of the second extension, passed June 10th, 1943, the regulation had been in effect only three months, since March 10th, 1943 (R. 89). It is but a single sentence in a long, complicated regulation. There is nothing in the congressional reports to indicate that it was given any consideration. The conference report to which we have referred (p. 12) which noted the amendment by the Senate, as well as the Senate report (Senate Report, 221, 78th Congress, 1st Session, p. 56), gave no hint of any such consideration.

These reports, as well as the title of the amendment itself, indicate that all that was being affirmatively considered

was extension of time "in connection with the release of powers". The extension in connection with non-exercise followed automatically.

Accordingly, we think it cannot be successfully maintained that at the time of decedent's death in January 1944, Congress had given thought to the Treasury regulation.

A rule that would require congressional action to overturn unauthorized departmental regulations would put a burden on Congress that would not only be onerous but would require constant scrutiny of the innumerable regulations emanating from the administrative bodies.

We submit that the rule applicable here is that stated by this court in *Helvering* v. *Reynolds,* 313 U. S. 428, where with reference to the argument that re-enactment was an adoption of previous interpretation, it was said (p. 432):

> "That rule is no more than an aid in statutory construction. While it is useful at times in resolving statutory ambiguities, it does not mean that the prior construction has become so embedded in the law that only Congress can effect a change. Morrisey v. Commissioner of Internal Revenue, 296 U. S. 344, 355."

Since, as we have shown, it is clear that Congress used the word "exercise" as a word of art, and as referring to effective, legal action by the donee of the power, the regulation, so far as it interprets that word to include a vain, ineffective and nugatory act, or a mere echo, is contrary to the congressional intention and therefore invalid.

The justice of this conclusion, as well as its logic, is emphasized and strengthened when it is noted that the effect of paragraph (3) of subsection (d) of section 403,

was to exempt a power theretofore created if it was (a) affirmatively, "released" or (b) negatively, "not exercised".

What decedent here did was not more than the equivalent of either an affirmative release or a negative silence. It accomplished nothing different than would either. It, therefore, should be treated in the same way.

Assuming, *arguendo,* that the property passed to the daughter under decedent's will she got precisely the same estate, in quality and quantity, as she would have received under her grandmother's deed of trust and will, no more, no less, and nothing different.

If decedent has affirmatively released his power as to all but what he gave to others, or if he had remained silent, the result would also have been precisely the same.

It has long been settled that the tax statutes are construed practically, emphasizing substance over form. If that be done here plaintiffs must prevail since it cannot be seriously disputed that the practical, as well as the legal, result of the decedent's conduct was precisely the same as if he had technically complied with the statute by affirmative release or negative silence.

In *Helvering* v. *Tex-Penn Oil Co.,* 300 U. S. 401, this court said (p. 402):

> "* * * the rule is well settled that in determining tax liabilities, taxing authorities must look through form to fact and substance * * * The validity of the ultimate finding above quoted is to be tested by what in fact was done rather than by the mere form of words used in the writings employed. *United States* v. *Phellis,* 257 U. S. 156, 158: *Curran* v. *Commissioner* (C. C. A. 5th), 40 F. (2d) 129, 131."

In *U. S.* v. *Joliet & Chicago R. Co.*, 315 U. S. 44, Mr. Justice Douglas said (p. 49):

> "The reach of the income tax law is not to be delimited by technical refinements or mere formalism. *Helvering* v. *Clifford*, 309 U. S. 331."

In *Commissioner* v. *Court Holding Co.*, 324 U. S. 331, Mr. Justice Black said (p. 334):

> "The incidence of taxation depends upon the substance of a transaction."

See also: *Bazley* v. *Commissioner*, 331 U. S. 737, 741.

If these principles are applied here it cannot be doubted that the ineffective form of purported exercise by Mr. Young must be disregarded and the substance of the transaction heeded, *viz.*, that he did not actually exercise his power, which was to dispose of the property other than as his mother directed it to go.

The only argument again this enforcement of the substance of the transaction is, in effect, that Congress intended "by technical refinements or mere formalism", to trap the unwary or uninformed who did not comply literally with the statutory requirements.

That Congress had no such purpose could not have been more forcefully indicated than by the extension for eight years of the period during which donees were permitted to become aware of the legislative changes and make adjustment accordingly.

And nothing could more significantly underscore such lenient indulgence than the provision added, in 1948, to the joint resolution which extended the expiration date to July 1, 1949, whereby, as heretofore pointed out (p. 13) immunity was extended to powers technically created after October 21st, 1942, provided the wills creating them had been made prior to October 21st, 1942.

In the face of all this evidence of congressional will to exempt not only powers not actually used, but, as well, powers unwittingly created, we submit that it cannot be consistently held that Congress intended to penalize one, who quite evidently unconscious of the change, permitted his ineffective will to stand. Such motives are certainly not to be imputed to a sovereign legislature.

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

LAWRENCE S. GREENBAUM,
MONROE J. CAHN,
FRANK J. NARDOZZI,
Attorneys for Petitioners.

FILED
SEP 4 1951
CHARLES ELMORE CROPLEY
CLERK

No. 251

IN THE

Supreme Court of the United States

OCTOBER TERM—1951

HENRY C. WILSON and EDITH Y. EDWARDS, as Executors under the last Will and Testament of LEWIS G. YOUNG, deceased,

Petitioners-Plaintiffs below,

v.

FRANK W. KRAEMER, as Collector of Internal Revenue for the District of Connecticut, and ano.,

Respondents-Defendants below.

PETITION AMENDING PETITION FOR WRIT OF CERTIORARI

WARNER PYNE,
MONROE J. CAHN,
FRANK J. NARDOZZI,
Attorneys for Petitioners.

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Respondents-Defendants below.

PETITION AMENDING PETITION FOR WRIT OF CERTIORARI

Petitioners' original petition for the issuance of a writ herein was duly filed on the 17th day of August, 1951, to review a judgment of the U. S. Court of Appeals for the Second Circuit rendered on the 4th day of June, 1951.

By this amending petition, petitioners propound an additional question for review which involves the application of the Powers of Appointment Act of 1951, which became effective on the 28th day of June, 1951, subsequent to the decision of the Court of Appeals.

QUESTION

Did the decedent exercise his powers of appointment within the meaning of the Powers of Appointment Act of 1951?

Petitioners respectfully submit that the language of the act, and the reports and debates of Congress with

respect thereto clearly establish that there was no exercise of such powers within the meaning of that act, in consequence whereof the property passing to decedent's daughter was not taxable.

Though passed long after decedent's death on January 12, 1944, the taxability of the property is regulated by the express provision of section 2 of the act providing that it shall apply to the estates of all those dying after October 21st, 1942.

This provision evidences, as the Congressional reports and debates make clear that this act is intended to replace all legislation on the subject since and including section 403 of the Revenue Act of 1942.

The Congressional discussions establish that the prior legislation was wholly tentative with respect to a subject as to which Congress was in great doubt as to the proper course to pursue. Those discussions further establish that the reasons for the numerous extensions of the exemption dates of section 403 were to enable study of the subject to be completed and a matured determination reached.

They further establish that in extending such exemption periods Congress did not intend to approve the Treasury regulation defining section 403(d) (3), upon which the courts below heavily relied in deciding the case adversely to plaintiffs.

This clearly appears from the act itself which does not readopt the crucial language of section 403(d) (3). Whereas the latter section provided that property should not be taxable if the power was "not exercised," the act provides in section 2 thereof, that

"* * * the failure to exercise such power * * *"

shall exempt the property.

Under this significant change in verbiage which is applicable and decisive here, the mere echo by decedent was,

in law, "failure" to exercise his power, which was to dispose of the property differently than his mother had directed.

In view of the manifest importance of the correct interpretation of the act to the proper administration of the federal tax laws, we respectfully urge that review of the decision below should be granted upon the question propounded herein.

Leave is respectfully requested to submit a brief in support of this amending petition by September 15th, 1951, delay being due to the death of Lawrence S. Greenbaum, former counsel for petitioners.

Dated: August 30, 1951.

Respectfully submitted,

WARNER PYNE,
MONROE J. CAHN,
FRANK J. NARDOZZI,
Attorneys for Petitioners.

[1658]

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Respondents-Defendants below.

BRIEF IN SUPPORT OF PETITION AMENDING PETITION FOR WRIT OF CERTIORARI

On August 17, 1951, the petitioners filed herein a petition for the issuance of a writ to review a judgment of the United States Court of Appeals for the Second Circuit rendered June 4, 1951 (R. 111).

On September 4, 1951, petitioners filed a petition amending said original petition to raise a further question under the Powers of Appointment Act of 1951, approved June 28, 1951, subsequent to the said decision of the Court of Appeals, and in said petition, by reason of the death of Lawrence S. Greenbaum, Esq., attorney of record for petitioners, requested leave until September 15th, 1951 to file this brief.

Jurisdiction

The decision of the Court of Appeals having been rendered on June 4, 1951, the ninety days within which to file a petition for certiorari expired on Sunday, September 2nd, 1951. The next day, September 3rd, 1951, being Labor Day, a legal holiday, the time of filing was extended (*Union National Bank* v. *Lamb,* 337 U. S. 38, 40), to September 4th, 1951.

Accordingly, assuming, *arguendo,* that the amending petition was required to be filed within the time limited for the original petition, such amending petition was timely.

The Question Presented by the Amending Petition

Did decedent exercise his powers of appointment within the meaning of the Powers of Appointment Act of 1951?

Section 2(c) of the Powers of Appointment Act provides:

> "EFFECTIVE DATE.—The amendments made by this section shall be effective as if made by § 403 of the Revenue Act of 1942 on the date of its enactment (applicable with respect to estates of decedents dying after October 21, 1942)."

Since decedent herein died on January 12, 1944 (R. 93), by virtue of the foregoing provision, § 403 of the Act of 1942 was superseded and the provisions of the Powers of Appointment Act of 1951 substituted as determinative of plaintiffs' rights herein.

It is, of course, well settled that, in an Appellate Court, the rights of the parties are to be determined by the law as it exists at the time the appeal is heard.

> *Ziffrin* v. *United States,* 318 U. S. 73, 78;
> *Vandenback* v. *Owens-Illinois Glass Co.,* 311 U. S. 538, 542.

Accordingly, the question here decisive is whether under the provisions of the Powers of Appointment Act of 1951, decedent "exercised" his powers so as to render the property passing to his daughter taxable in decedent's estate.

The relevant provision of the Powers of Appointment Act of 1951 is section 2(a)(1) thereof taxing property:

> "To the extent of any property with respect to which a general power of appointment created on or before October 21, 1942, is exercised by decedent (1) by will or (2) by a disposition which is of such nature that if it were a transfer of property owned by the decedent, such property would be included in the decedent's gross estate under sub-sections (c) or (d); but the failure to exercise such a power or the complete release of such a power shall not be deemed an exercise thereof."

The significant words are "the failure to exercise such a power".

It is to be noted that in this respect there was a change from the language of § 403(d)(3) of the Revenue Act of 1942, wherein the language used was "such power is not exercised".

The reports of Congress and Congressional discussion with respect to the Powers of Appointment Act of 1951 establish:

(1) That the various extensions of the time limit of § 403(d)(3) of the Revenue Act of 1942 were not approval by Congress of the Treasury regulations with respect thereto, upon which the courts below so heavily relied;

(2) That is not within the intent of the new act to tax property under the circumstances here existing.

With respect to the first of the foregoing propositions, it is clear from the reports (House Report 327, Senate Report 382, 82nd Congress, 1st Session) and Congressional discussions that the various extensions of time were stopgap measures, pending full and mature investigation and consideration of the substantive provisions of § 403 which in themselves were recognized to be highly unsatisfactory.

Thus, Mr. Camp who introduced the bill and made the main argument in the House in support of it said (97 Cong. Rec., p. 5121, col. 3):

> "Congress has recognized that the 1942 statutes are not satisfactory and with the approval of the Treasury Department, it has granted successive extensions of the effective date of those statutes as applied to unexercised powers created prior to the 1942 act. * * *"

Mr. Reed, in the House, said (97th Cong. Rec., p. 5126, col. 1):

> "The 1942 Revenue Act changed the entire concept of taxing property subject to powers of appointment and as the result of this act and as the result of subsequent Treasury regulations, this field of taxation was thrown into a chaotic and wholly unsatisfactory state."

In view of this situation, the failure of Congress to act with respect to those substantive provisions when extending the time limits thereof cannot be deemed to be an approval of the Treasury regulations issued with respect thereto. This view is sustained by the failure of Congress to re-enact the language of the prior act construed by the Treasury regulation invoked below.

With respect to the second proposition, the reports and discussion evidence the Congressional purpose with regard to powers created before October 21, 1942 to be to restore the law as it existed prior to October 31, 1942,

excepting insofar as the prior law required the property to "pass" under exercise of the power of appointment.

At bar, the question of passing has never been claimed by plaintiffs to be of any importance. Plaintiffs have never contended that the property was not taxable because it did not pass under decedent's will or act. Plaintiffs' contention has always been that no tax was assessable on the property passing to the daughter because decedent failed legally to exercise his power.

In the House, Mr. Camp said (97th Cong. Rec., p. 5122, col. 1):

> "It would be objectionable retroactive taxation if the tax should be made to apply to unexercised powers created before the passage of the first statute which taxed unexercised powers."

Mr. Reed said (97th Cong. Rec., p. 5126, col. 2):

> "The first part (of the bill) in effect restores the law as it existed prior to the 1942 act for those powers which were created on or before October 21, 1942."

Under the law as it existed prior to 1942, the act of the decedent herein in merely echoing his mother's provisions in default of effective exercise of the power would not have rendered taxable the property taken by the daughter. Such property under the prior law would have been free from tax not because it did not pass under decedent's act but because the echoing was not an exercise of the power.

That was made clear by this Court in *Rogers* v. *Helvering*, 320 U. S. 410, wherein this Court said (p. 415):

> "Where a donee of a power merely echoes the limitations over upon default of appointment, he may well be deemed not to have exercised his power and there-

> fore not to have passed any property under such a power."

The mature deliberations which resulted in the Powers of Appointment Act of 1951 must have taken into account this clear statement.

Accordingly, the words of the statute that "the failure to exercise such a power, * * * shall not be deemed an exercise thereof" include the wholly ineffective and meaningless repetition by decedent of his mother's direction.

In *Commissioner* v. *Church,* 335 U. S. 632, in criticising *May* v. *Heiner,* 281 U. S. 238, Mr. Justice Black said (641):

> "Thus was formal legal title, rather than the substance of a transaction, made the sole test of taxability under § 811(c)."

Certainly, that criticism may justifiably be applied to the assessment of the tax here where decedent's verbal act insofar as his daughter was concerned was the exact equivalent of the failure to exercise his power or the release of it, his power being to give the property other than as his mother had directed.

The writ of certiorari should, therefore, be granted.

Respectfully submitted,

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